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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	**IGWA AND POCATELLO'S JOINT RESPONSE TO THE SURFACE WATER COALITION'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

The City of Pocatello ("Pocatello" or "City") and the Idaho Ground Water Appropriators, Inc. ("IGWA") submit this joint response to the motion for partial summary judgment (the "Motion") filed by the A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and the Twin Falls Canal Company (collectively, the "Surface Water Coalition" or "Coalition") in this matter.

I. BACKGROUND

This case was commenced by the delivery of a letter to Karl Dreher, the Director of the Idaho Department of Water Resources ("IDWR"), from the Surface Water Coalition, requesting curtailment of junior ground water rights for the benefit of their surface water rights (the "Delivery Call Letter"). After receiving the Delivery Call Letter and instituting the SWC Delivery Call proceedings, the Director sought factual information from the Coalition on two separate occasions and ordered briefing on certain questions of law. Then, the Director issued an emergency order on May 2, 2005 (the "May 2 Order") that, *inter alia*, directed curtailment of wells junior to February 27, 1979[1] and made significant findings of fact and conclusions of law applying the Rules for Conjunctive Management of Surface and Ground Water Resources (the "Rules"). The May 2 Order determined that the reasonably likely injury to Coalition members in 2005 was 133,400 acre-feet, including 27,700 acre-feet of surface diversion shortage and 105,700 acre-feet of shortage in carryover storage to 2006. Relying on more current information regarding the 2005 irrigation season, the Director revised his projection of injury by orders issued on July 22, 2005, and December 27, 2005.

[1] Prior to the May 2 Order, the Director issued an Order on April 19, 2005, and the curtailment was originally ordered in the April 19 order. The April 19 order was subsequently revised on substantive issues related to the Director's injury determination. The revisions are contained in the May 2 Order and it is that Order which is the subject of the hearing in this matter.

The Coalition's Motion challenges the procedures IDWR used in responding to the Delivery Call Letter, specifically attacking what the Coalition calls the "unprecedented procedure" used by IDWR and alleging that those procedures are contrary to Idaho law. Beginning its argument by setting out a vastly oversimplified version of administration of water rights in Idaho, the Surface Water Coalition then alleges that the standard used by the Director to determine material injury in the May 2 Order illegally "re-determines" decreed and licensed water rights, violates certain SRBA orders, and violates the Rules.

Each of the Coalition's arguments fails as a matter of law or raises issues of disputed facts, or both. This response brief first responds to the crabbed interpretation of Idaho law provided by the Surface Water Coalition, which, in effect, reduces water rights to nothing more than an amount and a priority date. It then describes the nature of the Director and IDWR's administration responsibilities, which are far from ministerial. The brief then concludes by debunking the specific arguments raised by the Surface Water Coalition in the Motion.

II. STANDARD OF REVIEW

The Coalition sets forth the applicable standard of review on a motion for summary judgment. However, the Coalition's statement of the standard of review includes inappropriate argument. Thus, IGWA and Pocatello dispute the portion of the standard of review in which the Coalition asserts it has established the "relevant" facts, that it has accurately stated the law pertaining to the issues presented, and that the issues presented by the Coalition present undisputed facts.

III. BASIC PRINCIPLES OF IDAHO WATER LAW

In its Motion, the Surface Water Coalition offers a temptingly simple description of water law, conjunctive management, and water rights administration. *See* Surface Water Coalition's Motion for Partial Summary Judgment and Supporting Legal Points and Authority at 7-9 ("SWC

Brief"). In the world of the Coalition, conjunctive management would look like this: the Department would monitor the natural flow supply minute by minute, and without any investigation into whether water was needed by senior water right holders, simply curtail junior groundwater rights whenever the natural flow supply fell below the cumulative flow rates of senior natural flow rights. The Coalition argues that this "shut and fasten" administration should occur without IDWR investigating injury, shortage, hydrological factors, the possibility of futile call, or other factors.

Notwithstanding these shortcomings, the Coalition describes Idaho's prior appropriation system as coming down to nothing other than "first in time, first in right." The possibility that ground water might be curtailed for wasteful or futile ends is academic to the Coalition. In other words, under the Surface Water Coalition's theory of Idaho law, the only question is whether senior surface users have available to them *all* the water under their decrees at all times. If not, they say, they are injured and the only remedy is immediate "shut and fasten" administration.

This characterization of the Idaho prior appropriation doctrine is wrong. Section 3 of Article XV of the Idaho Constitution ("Section 3") is the foundation of the prior appropriation doctrine in Idaho. It states that:

> [t]he right to divert and appropriate the unappropriated waters of any natural stream ***to beneficial uses***, shall never be denied. . . . Priority of appropriation shall give the better right as between those using the water.

IDAHO CONST. art. XV, § 3 (emphasis added). The Coalition's "priority only" version of prior appropriation incorporates only a portion of Section 3, namely that "[p]riority of appropriations shall give the better right as between those using water." SWC Brief at 7. It neither notes Section 3's "beneficial uses" language, nor attempts to explain what the words "those using the water" might indicate about the process of water rights administration.

Perhaps because this is the explanation: an Idaho water right is much more than an amount and a priority date. It is a right with inherent limitations—limitations based on principles of beneficial use, waste, efficient diversion, reasonableness, and maximum and optimum use. And the Director has discretion to administer the Surface Water Coalition's water rights relying on those principles and others, including application of the futile call doctrine.

A. Application to Beneficial Use is the Limit of a Water Right

Idaho courts began early to recognize limitations on water rights. A water right is limited to delivery, in priority, of that amount of water that is necessary for beneficial uses.[2] "Beneficial use" means having a need for the water; Idaho courts have placed limits on appropriation of water to that amount necessary to satisfy lawful requirements.[3] In other words, the law does not and cannot provide that the full amount of a decreed water right should be available at all times. For example, the full amount decreed is not necessary at the start of the irrigation season when water is brought into the ditch slowly, or at end of the irrigation season when irrigators need much less water for beneficial purposes. As another example, each member of the Coalition has

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[2] *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997) ("Integral to the goal of securing maximum use and benefit of our natural water resources is that water be put to beneficial use. This is a continuing obligation."); *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 10, 154 P.2d 507, 510 (1944) ("Respondents . . . were entitled to a continuous use of the water as of the dates of their priorities . . . provided the water was applied to a beneficial use."); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 582, 513 P.2d 627, 634 (1973) (recognizing that it is the "traditional policy of the state of Idaho" to require the water resources of the state "be devoted to beneficial use in reasonable amounts").

[3] *Farmers' Co-op. Ditch Co. v. Riverside Irrigation Dist.*, 16 Idaho 525, 535-36, 102 P. 481, 483-84 (1909) ("Economy must be required and demanded in the use and application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water."); *Abbott v. Reedy*, 9 Idaho 577, 581, 75 P. 764, 765 (1904) ("It is true that he said he had been using about two inches per acre, but the law only allows the appropriator the amount actually necessary for the useful or beneficial purpose to which he applies it. The inquiry was, therefore, not what he had used, but how much was actually necessary."); *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1943) (declining to find for appellant regarding claims to water rights because the measure of a water right is the amount actually necessary for the use rather than the habits of the water user); *Drake v. Earhart*, 2 Idaho 716, 756, 23 P. 541, 543 (1890) (stating that "the first appropriator shall not be allowed more than he needs for some useful purpose; that he shall not, by wasting or misusing it, deprive his neighbor of what he has not actual use for").

claimed that it has received less water than usual under its decrees, yet many have admitted they have not been injured by this. *See* Exhibits of Affidavit of Brad V. Sneed, dated April 27, 2006.

In fact, the concept of beneficial use is so important it constitutes a doctrine in and of itself. "[T]he doctrine of beneficial use is a concept that . . . permeates Idaho's water code." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 743, 947 P.2d 409, 416 (1997) (citing IDAHO CONST. art. XV, § 3). And in the context of administration, a priority date is almost never the subject of dispute or question; it is a constant factor, a stationary piece. Not so for beneficial use. Virtually all of the court decisions relating to administration concern questions stemming from *use*; rarely must the cases determine relative priority.[4]

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[4] The decision in *Knutson v. Huggins* provides a summary of the case law on this point. It states:

> At such times as an appropriator is not using the water under his appropriation, and is not applying the water to a beneficial use, such water must be considered and treated as unappropriated public water of the state, and for such period of time is subject to appropriation and use by others. When an appropriator is not using water under his appropriation and during the season not covered by his appropriation, he must allow the water to flow down the bed of the natural channel. Later, in *State v. Twin Falls Canal Company*, 21 Idaho 410, 411, 429, 121 P. 1039, L.R.A.1916F, 236, we adhered to the rule announced in the *Hutchinson* case, supra, holding: "It is the policy of the law of this state to prevent the wasting of water." And in *Glavin v. Salmon River Canal Company, Ltd.*, 44 Idaho 583, 589, 258 P. 532, 534, we again held: "It is against the public policy of this state, as well as against express enactments [then Sec. 5640, C.S., now Sec. 41-816, I.C.A.], for a water user to take more of the water to which he is entitled than is necessary for the beneficial use for which he has appropriated it," pointing out that "public policy demands that whatever be the extent of a proprietor's right to use water until his needs are supplied, his right is dependent upon his necessities, and ceases with them," citing and adhering to *State v. Twin Falls Canal Company, supra*, and *Hutchinson v. Watson Slough Ditch Company, supra*. It follows then that at such times during the irrigation season as respondents are not using and beneficially applying the water decreed to them, appellant, for such periods of time, has a right to use and beneficially apply such water.

Knutson v. Huggins, 62 Idaho 662, 115 P.2d 421, 424 (1941) (some internal punctuation and citations omitted).

B. The Prohibition of Waste is the Corollary to Application to Beneficial Use

Under Idaho law, water use may not be wasteful. Waste is the corollary to the limitations arising from a showing of need and beneficial use limitation: no appropriator may make a wasteful use of water.[5] Avoiding waste of water is of such importance that the Idaho Legislature has criminalized it. *See* I.C. § 18-4309. It is especially important to note that what constitutes waste depends on facts. For example, the Idaho Supreme Court has found a fifty percent (50%) ditch loss to be unreasonable. *Basinger v. Taylor*, 36 Idaho 591, 597, 211 P. 1085, 1086 (1922). The Idaho Supreme Court, affirmed by the United States Supreme Court, has also found that a means of diversion that required the use of the entire current of the river to the destruction of rights of other junior appropriators was unreasonable (i.e., wasteful), and therefore could not be enforced. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 118 (1912).

C. Idaho Water Law Includes Principles of Reasonableness, and Optimum and Maximum Use

If the sparing use of the words "to beneficial uses" and "priority of appropriation shall give the better right" described the prior appropriation doctrine's sole narrow limits, then much of the Idaho Supreme Court's development of these constitutional principles might be suspect. However, the spare and elegant language used in Article XV has been interpreted in the context of the factual disputes reaching Idaho's highest court to include the refinements that beneficial uses must be reasonable and that beneficial uses should maximize or optimize use. For example:

> A prior appropriator is only entitled to the water to the extent that he has use for it ***when economically and reasonably used***. It is the

[5] *Burley Irrigation Dist. v. Ickes*, 116 F.2d 529, 535 (Dist. Ct. D.C. 1940); *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1223 (1976) ("The law of water rights in this state embodies a policy against the waste of irrigation water."); *Poole v. Olaveson*, 82 Idaho 496, 504, 356 P.2d 61, 65-66 (1960) (stating that it is "the expressed policy of this State to secure maximum beneficial and least wasteful use of its water resources"); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997) ("A water user is not entitled to waste water.").

> policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes.

Wash. State Sugar Co. v. Goodrich, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915) (emphasis added).[6]

The Court has also interpreted the Idaho prior appropriation doctrine to require application of the principle of maximum use. *Poole v. Olaveson*, 82 Idaho 496, 504, 356 P.2d 61, 65-66 (1960) (stating that it is "the expressed policy of this State to secure maximum beneficial and least wasteful use of its water resources"); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997) (stating that "Idahoans must make the most efficient use of" the state's limited water resources, and thus must "secure the maximum use and benefit, and least wasteful use, of its water resources"); *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) (stating that "the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources").

Optimum use or development, a more modern term for maximum use, is an additional mandate for state water management. Article XV, section 7 authorized the creation of a State Water Resource Agency (now the Idaho Water Resource Board) with significant powers to plan, fund, and construct water resource projects and "to formulate and implement a state water plan for optimum development of water resources in the public interest." IDAHO CONST. art. XV, § 7.[7] In *Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982), the Supreme Court

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[6] *Accord Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 582, 513 P.2d 627, 634 (1973) (recognizing that it is the "traditional policy of the state of Idaho" to require the water resources of the state "to be devoted to beneficial use in reasonable amounts").

[7] Idaho Code § 42-1730(2), enacted in 1988, echoes this Constitutional policy by providing that "[t]he welfare of the people of Idaho is dependent upon conservation, development and optimum use of our water resources and waterways." I.C. § 42-1730(2) (emphasis added). The statement of legislative intent for this statute

held that this constitutional amendment simply "reinforced" the existing constitutional policy of "maximum use and benefit" of our water resources.

D. The Futile Call Doctrine Applies

If an Idaho water right were comprised merely of a priority date and an amount, delivery calls could be placed even if the water called for could not reach the calling rights. Such a result would be wasteful as it would require juniors to forego diversions even though the calling senior could not receive the water sought to be curtailed. Thus, in addition to the refinements to the beneficial use doctrine of the prohibition of waste and the requirement of reasonableness, the right of a senior to call against juniors is also limited by the futile call doctrine. Calling water rights are not entitled to curtailment of juniors if such curtailment would be "futile"—in other words, the water returned to the stream through curtailment could not be made available at the time, in the location, and for the amount necessary to avoid injury to a senior. Under the futile call doctrine, the junior right potentially subject to curtailment must be deliverable to the calling right. *See Jackson v. Cowan*, 33 Idaho 525, 196 P. 216 (1921) (holding that impossibility of delivery was a defense to a delivery call). If it is not, then curtailment is not proper, a point that incorporates hydrologic realities into administrative decision-making. This has been confirmed by the Idaho Supreme Court, which stated that:

> We agree that if due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in

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recites that "[I]n a state such as Idaho, it is essential that the state exercise its full authority to manage its water. To that end, it is the purpose of this act to provide for the full exercise of the state's rights and responsibilities to manage its water resources." 1988 Idaho Sess. Laws, ch. 370, § 1. *See also* I.C. § 42-4201 ("The welfare of the people of the state of Idaho is dependent upon the conservation, development, augmentation and optimum use of the water resources of this state. The legislature deems it essential therefore that every effort be made to foster and encourage water projects designed to promote these objectives."); I.C. § 42-4201A ("The welfare of the people of the state of Idaho is dependent upon the conservation, development, augmentation and optimum use of the water resources of this state. The legislature deems it essential therefore that every effort be made to foster and encourage water projects and water use that will augment ground water basin recharge.").

> sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.

Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976).

The futile call doctrine, while certainly important as between senior surface water rights, also has significant applicability in the conjunctive management context. Colorado directly faced this issue in *Fellhauer v. People*, 447 P.2d 986 (Colo. 1968). The Colorado Supreme Court in *Fellhauer* faced the fact that wells in a common aquifer "are frequently scattered at indiscriminate distances and bear random priorities," and that strict priority shut-offs in response to a call from a surface user would cause the most junior users to stop pumping even though they may be the most distant and least offensive to the senior user—a most inefficient result, and one that would result in futile calls. The Court acknowledged that:

> [s]trict administration on the basis of seniority would plainly prevent a full beneficial use of water in the aquifer. . . . Futile calls on distant or even proximate diversions are unavoidable without a precise understanding of the well-surface relationship in each case.

Fellhauer, 447 P.2d at 996 (quotations omitted).

In summary, the Coalition's Motion must fail because it is based on an improper characterization of the constituent parts of their surface water rights and of the Idaho prior appropriation doctrine. The Coalition's rights are limited by concepts of beneficial use and maximum utilization. Further, the Coalition's use of its rights is limited by the prohibition on waste and futile call. The legal foundation of the Coalition's motion is incorrect and as a result, its Motion should be denied.

IV. ADMINISTRATION IS NOT MINISTERIAL

The Coalition's Motion hinges on the argument that the bare "priority of appropriation" language in Section 3 describes the full scope not only of the prior appropriation doctrine as

recognized in Idaho, but also the full scope of factors that the State may consider in exercising its constitutionally-derived regulatory authority over water resources. The Legislature and courts have clearly established that prior appropriation is more than amount and priority and IDWR is well within its authority, in fact obligated, to enforce the doctrine as it has been developed—to include concepts of beneficial use, prohibition of waste, reasonable use, and maximum and optimum use—in the context of the SWC Delivery Call. IDWR has far more than a ministerial duty to administer water rights.

The discretionary nature of the Director's authority to administer water rights is based in Chapter 6 of Title 42 of the Idaho Code ("Chapter 6"), which expressly places the watermaster "under the direction of the department of water resources." I.C. § 42-607. The statute provides that "[t]he ***director*** of the department of water resources shall have direction and control of the distribution of water." I.C. § 42-602 (emphasis added). By setting forth the terms of this supervision and control in the orders at issue here, the Director is fully within his authority and the requirements of law.

Furthermore, Idaho Code section 42-607 does not mandate an administration process where the Director considers only priority while ignoring the other elements of the prior appropriation doctrine. This provision states, in pertinent part:

> 42-607. DISTRIBUTION OF WATER. It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when ***in times of scarcity*** of water ***it is necessary*** so to do in order ***to supply the prior rights of others*** in such stream or water supply.

I.C. § 42-607 (emphases added). The Coalition argues that this statute mandates the automatic shut-off of every hydraulically connected junior water right when they declare a time of scarcity. However, Section 42-607 does not impose a rote, ask-no-questions, "shut and fasten" response when a senior calls for water. Rather, it indicates that someone—namely, the Director—is entitled to find that: (1) there exists a "time[] of scarcity;" (2) it is "necessary" to curtail a junior diversion; and (3) doing so will "supply" senior rights. In other words, even the language of this provision indicates that the Director must find that there is a shortage occurring, that it is attributable to particular junior rights, and that shutting off these rights will not be futile. As noted, Chapter 6 gives the ***Director*** the responsibility of making such findings.[8] The statute leaves to the Director's sound discretion determinations of what is "necessary" to actually "supply" senior rights, giving due regard for whether his action actually will deliver water to the senior, whether it is a delivery (or a curtailment) "in whole or in part," and whether it responds to the nature and extent of the scarcity.

Section 42-602 also does not support the Surface Water Coalition's argument that ground water wells should be shut off without any determination of elements mandated by the prior appropriation doctrine. Section 42-602 provides:

> 42-602. DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES TO SUPERVISE WATER DISTRIBUTION WITHIN WATER DISTRICTS. The director of the department of water resources shall have ***direction and control of the distribution of water*** from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by

[8] Section 42-607, as amended, also says absolutely nothing about the timetable under which the Director is to shut and fasten any diversion. This was not always the case. Until 1994, section 42-602 provided that the Director had "***immediate*** direction and control of the distribution of water." (Emphasis added). It was on the basis of this prior language that *Musser* was decided. In prompt response to *Musser*, the Legislature amended section 42-602 to delete the word "immediate." 1994 Idaho Sess. Laws, ch. 450.

> watermasters as provided in this chapter and supervised by the director.
>
> The director of the department of water resources shall distribute water in water districts ***in accordance with the prior appropriation doctrine***. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

I.C. § 42-602 (emphases added). Here, in a companion provision to section 42-607, the Legislature has vested the Director with the broad administrative powers referenced above. The Director has been given the "direction and control of the distribution of water," restricted only by the admonitions that it be done "as provided in [Chapter 6];" that distribution be "in accordance with the prior appropriation doctrine;" and that the Chapter 6 authorities are to apply "only to distribution of water within a water district." As with section 42-607, section 42-604 says nothing about the timing of any curtailment, nor does it order a rote curtailment program based solely on priority without consideration of other elements of the prior appropriation doctrine.

Furthermore, Chapter 6 also states that in directing the watermaster, "[t]he director may ask for other information deemed necessary in assuring proper distribution of water supplies within the district." I.C. § 42-606. This explicit grant of authority in section 42-606 empowering the Director to acquire "additional information"—that is, to ***find facts***—he deems "necessary" for water right administration precisely mirrors the same word ("necessary") used in the same context in section 42-607, which authorizes curtailment of juniors only when "necessary" to supply the rights of a senior. Far from mandating a rote curtailment scheme of strict priority administration, Chapter 6 authorizes the Director to base curtailment instead on considered facts. The Director's May 2 Order is based in these statutory directives and is consistent with it. The Coalition's arguments on these points are without basis.

V. FACT FINDING CONCERNING CURRENT BENEFICIAL USE IN THE CONTEXT OF WATER RIGHTS ADMINISTRATION IS NOT A "RE-ADJUDICATION" OF A WATER RIGHT, BUT RATHER, ENSURES THE SENIOR WATER RIGHT IS BEING

EXERCISED CONSISTENT WITH THE ONGOING LIMITATION THAT WATER DIVERTED UNDER SUCH RIGHT IS PLACED TO BENEFICIAL USE BEFORE A JUNIOR RIGHT MAY BE CURTAILED

The Surface Water Coalition's primary argument can be summarized as follows: because the Director relied on the concept of "minimum full supply" to arrive at certain conclusions concerning injury to their water rights in the May 2 Order, he effectively has "re-adjudicated" the Coalition members' decreed water rights. *See* SWC Brief at 9-14. They argue that this "re-adjudication" occurs because the May 2 Order does not simply find that the Coalition members should receive all the water under their natural flow rights and storage contracts at all times. *See* Coalition Brief at 11. In other words, they argue that IDWR's non-discretionary duty is to immediately "shut and fasten" junior rights irrespective of actual need, actual beneficial use, and whether such curtailment would make water available at all.

The Coalition is wrong. The Idaho Supreme Court has specifically held that "the details of the performance of the [Director's administration] duty are left to the [D]irector's discretion." *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). It also has found that state water administration officials have an obligation look to more than the decree in administering water rights. In *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 283 P. 522 (1930), the senior decree holders argued to the Court that *they* were the arbiters of the terms of their decree and that the water administrators were to distribute water pursuant to *their* instructions. In that case, the decree was for irrigation, but did not specify a season of use. The decree holders argued that they were "entitled to apply water to their lands for the purpose of irrigation as early as it may be beneficially applied" and that they "were given the exclusive right to determine the time when water may be beneficially applied." *Arkoosh*, 48 Idaho at 395, 283 P. at 525. Disagreeing, the Court stated:

> The respondents are entitled to apply water to their lands for the

> purpose of irrigation as early as it may be beneficially applied. Under neither the statutes nor the Frost decree are they entitled to water when it cannot be so used. Under the provisions of the decree in this case respondents appear to have the right to demand water for the purpose of irrigation at any time during the entire year when the same can be applied to a beneficial use. By the terms of the decree herein, respondents are made "the judges of the times when" the water can be used, and if the decree remains as entered their right to receive water at any time they may demand it is a matter finally adjudicated. We have concluded that the decree is in this respect too broad. Our present statutes give the commissioner of reclamation the "immediate direction and control of the distribution of water from all of the streams to the canals and ditches diverting therefrom." We are of the opinion that the matter should be determined by that department.

Id. at 395-96, 283 P. at 525-26 (emphases added; citation omitted). In other words, the Court recognized that it was proper for the water administration official to determine whether the senior could beneficially use the water at the time for which it was called.[9]

The Coalition's rhetoric notwithstanding, their water rights have not been "re-adjudicated" by the Director through the methods developed in the May 2 Order. In Idaho, water rights are not absolute rights but rather, as usufructs, are to be administered subject to the inherent condition and limitation requiring continuing beneficial use. *See Caldwell v. Twin Falls Salmon River Land & Water Co.*, 225 F. 584, 595 (D.C. Idaho 1915) (stating that "waters of the state belong to the public and the private right that the individual acquires by appropriation or purchase is usufructuary only and further that at any given time the extent of his reasonable need is the measure of the maximum amount he is entitled to receive for the time being to divert from the stream or to receive and use"). *See also Arkoosh,* 48 Idaho at 395-96, 382 P. at 525-26

[9] The statute quoted by the Court in *Arkoosh*, Idaho Code section 42-602, to the effect that the commissioner of reclamation had the "immediate direction and control" of water distribution was amended by the legislature in 1994 to remove the word "immediate," and to instruct IDWR to distribute water in water districts "in accordance with the prior appropriation doctrine." See *supra* Part IV., n.7. The 1994 amendments do not, however, affect the *Arkoosh* decision with respect to the Director's authority to determine whether the senior needs the water before curtailing juniors.

(holding that the right holder is entitled only to the amount necessary for beneficial use as determined by Director).

Under Idaho law, beneficial use is "a continuing obligation" that does not end with the entry of a decree. A water right only authorizes an appropriator to receive the amount of water necessary for beneficial use, "regardless of the amount of their decreed right." *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427 n.5, 546 P.2d 382, 390 n.5 (1976). Enforcing and giving full effect to the inherent beneficial use limitation through water rights administration is not a "re-adjudication."

The law of beneficial use follows the water. It follows the water right after entry of the decree, and it follows the water after it is diverted. It does this to continuously ensure that the constitutional beneficial use requirement is satisfied. *See Boise Irrigation. & Land Co. v. Stewart*, 10 Idaho 38, 77 P. 25, 27 (1904) ("Thus it appears that the Legislature has and does exercise a certain control over all the waters of the state while they are flowing in the natural channel of the stream, and the law follows the water, after it is diverted therefrom, to see that it is applied to a beneficial use."). Furthermore, this inherent limitation and condition on all water rights exists for the benefit of the *junior* appropriators. *Mountain Home Irrigation Dist. v. Duffy*, 79 Idaho 435, 443, 319 P.2d 965, 969 (1957) (when a prior appropriator has no current actual need for water, it is his duty "to allow the water which he has a right to use to flow down the channel for the benefit of the junior appropriators"); *Burley Irrig. Dist. v. Ickes*, 116 F.2d 529, 535 (1940) (stating that the senior's right "is qualified by the limitation, made in favor of subsequent appropriators and the widest possible use of water on arid lands, that all of the water he uses must be beneficially applied and with reasonable economy in view of the conditions under which the application must be made").

Arguments that water right administration that enforces the inherent limitations that exist on every water right is a "re-adjudication" of the right have been tried in several other states—Montana, Oregon, Nebraska, Colorado, and Wyoming—and have failed.[10] For example, over half a century ago, the Nebraska Supreme Court held that:

> The duty of the administrator, in administering the waters of the stream by virtue of the police power of the state, is to enforce existing priorities, not to determine, change or amend them. But in regulating the distribution of water it may become incidentally necessary for him to ascertain for that purpose only whether a prior appropriator is injured by a diversion above him. This finding of fact must be made, not to change existing priorities, but in order to determine whether or not a distribution of water may be made to a junior appropriator in accordance with existing priorities.

State ex rel. Cary v. Cochran, 292 N.W. 239, 247 (Neb. 1940). The Oregon Supreme Court agrees. The Oregon Supreme Court specifically confirmed the administrator's authority to consider factors other than priority and quantity—factors such as waste and maximum use—in distributing water. It found that:

> it is the duty of the water master, or of those who administer the decree, not to allocate the water to a water user, who, on account of changed conditions, cultivates a less quantity of land one year than another and does not need the water allotted to him and cannot use the same for a beneficial purpose, or if, for any reason the water is not needed by a water user for a beneficial purpose, although the same may be awarded to him, the water master should regulate the

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[10] *See, e.g.*, *Weibert v. Rothe Bros.*, 200 Colo. 310, 316, 618 P.2d 1367, 1371 (1980) (stating that limitations of beneficial use and others are "read into every water right decree by implication" and as such are enforceable by administrators); *Parshall v. Cowper*, 143 P.302, 304 (Wyo. 1914) (finding that because the amount of water to which an appropriator is entitled may be more at one time than at another, the water commissioner could close or partially close a headgate to prevent waste of water, and in doing so the quantity delivered may and should be changed from time to time as the needs of an appropriator require); *Squaw Creek Irrig. Dist. v. Mamero*, 214 P. 889, 893 (Or. 1923) (holding that water right administration is not "limited to measuring out and distributing to plaintiff and other water users upon the stream the maximum quantity of water to which each is entitled under the priorities specified in the decree," but includes "regulat[ing] the headgates of ditches so as to prevent the waste of water, or its use in excess of the volume to which the owner of any water right is lawfully entitled"); *Hidden Hollow Ranch v. Fields*, 92 P.3d 1185, 1190-91 (Mont. 2004) (administrative determinations regarding the amount of water naturally present in a stream and the quantity of water discharged from a spring were "a necessary part of enforcing and administering the water right previously adjudicated in the 1940 decree" that did not "re-adjudicate" previously existing water rights or otherwise modify the 1940 decree).

> same so that there should be no waste of water. Beneficial use is the limit of the right to the use of water in this state.

In re Water Rights of Deschutes River & Its Tributaries, 36 P.2d 585, 587 (Or. 1934).

Perhaps the Coalition is seeking a ruling that injury can be determined as a matter of law; if it is successful, the Coalition can avoid inquiry into the inconvenient facts that underlie their delivery call. For example, the Twin Falls Canal Company ("TFCC") has claimed places of irrigation use that were formerly irrigated and which now, due to urbanization of their region, include non-irrigated acres. However, TFCC placed its delivery call for delivery of all of its water rights, and did not mention that the lands which can be irrigated by its water rights have been reduced by a substantial amount. *See* Affidavit of Scott N. King, P.E. dated April 27, 2006 [hereinafter "King Affidavit"]. These lands are no longer irrigated because they have been converted to roads, buildings, parking lots, commercial establishments, or similar non-agricultural and non-irrigated uses, and the conversion of Twin Falls tract lands to suburban and urban uses is ongoing. King Affidavit at 5-7. TFCC's manager testified at his deposition that the conversion of irrigated acreage to subdivisions is occurring at a "dramatic[]" rate. King Affidavit at 7 [Alberdi Depo 38:5]. The TFCC situation illustrates the distinction between the decree limit for a water right and the limitation that delivery of that water right in times of shortage must be made by reference to the ability of the right holder to beneficially use the water. Without fact-finding of the kind conducted by the Director to determine actual need in accordance with beneficial use, the Director could have ordered delivery of water that could not be used by TFCC. As the *Deschutes* case cited above indicates, these "changed conditions" are precisely why the Director must look at more than the decree in administering water rights.

VI. ADMINISTRATION OF WATER RIGHTS IN IDAHO CONSIDERS *ALL* WATER RIGHTS AVAILABLE TO ACCOMPLISH A BENEFICIAL USE

The Surface Water Coalition argues the Director erred by considering storage water supplies in combination with their natural flow rights in evaluating whether the Coalition's members had sufficient water supplies to accomplish the beneficial uses authorized under their senior water rights. SWC Brief at 14. According to the Coalition, the Director's administration must be blind to its members' storage and can consider only whether sufficient natural flow exists to satisfy their natural flow decrees. They argue that if natural flow is not available up to the full decreed quantity at any time during the irrigation season, then injury has occurred and junior ground water users must be curtailed—regardless of whether a Coalition member actually has on hand a full water supply through a combination of its natural flow and storage. Once again, in the Coalition's view, water rights administration under the prior appropriation doctrine does not concern itself with actual beneficial use, but only with quantity and priority. There are a number of problems with this simplistic argument, both legally and practically.

First, as has been discussed previously in this brief, the Director must consider actual beneficial use in administering water rights, and he cannot compel curtailments to supply water to a senior right holder who cannot beneficially use the delivered water. This principle is well founded in Idaho water law. The Coalition's position is directly contrary to this admonition to distribute water to satisfy only beneficial uses, not simply decreed quantities. Stated another way, a junior right may not be curtailed to provide water to a senior who already has sufficient water available under his or her water rights to fulfill the authorized beneficial use.

The Coalition's theory would impermissibly cause curtailment of juniors (or the incurring of mitigation obligations) even when the senior could not use the water. For example, in the 2005 water year, there were numerous periods when TFCC was not diverting natural flow

available to it under its senior rights, presumably because it did not need the water. *See* Affidavit of Charles M. Brendecke dated April 26, 2006 ["Brendecke Affidavit"], at ¶ 10 to 14. Indeed, during the periods in the 2005 irrigation season before July 18 and after September 19, TFCC elected to forego diversion of 179,000 acre-feet of natural flow that it could have diverted under its senior natural flow rights. Brendecke Affidavit at ¶ 15. This 179,000 acre-feet of water, along with an additional 339,000 acre-feet of natural flow, was diverted by Coalition members with rights junior to TFCC. Brendecke Affidavit at ¶ 15. The Coalition nevertheless would have had junior ground water rights curtailed in 2005, which theoretically would have produced reach gains that also would not have been diverted by TFCC.[11]

The Coalition's objection that the May 2 Order improperly "combines" their natural flow and storage rights presumes the Director should ignore the storage water available to each Coalition entity and the reason they have storage. They argue that the Director must curtail juniors in an attempt to make natural flow available to fill each of its member's natural flow rights ***throughout the entire irrigation season***. This theory ignores the fact that there never has been sufficient natural flow to satisfy even the most senior Surface Water Coalition natural flow rights throughout the irrigation season. The Coalition's approach would require juniors to make hydrologic conditions better for the Coalition than when its members appropriated their rights. For example, historic river flow data shows that well before any ground water pumping began, Snake River flows were variable and were always insufficient to meet even the senior Surface Water Coalition water rights throughout the irrigation season. Brendecke Affidavit at ¶¶ 5 to 6.

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[11] The Director's December 27, 2005 order appears to endorse the Coalition's theory by finding that TFCC was injured in 2005 to the extent of approximately 152,000 acre-feet on the sole basis that TFCC diverted that much less water in 2005 than it did in 1995. The December 27, 2005 order undertakes no analysis of the 179,000 acre-feet of water TFCC could have diverted in priority but instead deferred to junior users. Nor does this order attempt to determine why TFCC may have chosen not to divert the water. Obvious reasons abound, including the unusually wet spring in 2005 that reduced irrigation requirements and, for certain of the Coalition members, reduced irrigated acres within their service areas. *See* King Affidavit.

Ground water users cannot now be administered in an attempt, presumably futile, to enhance river flows beyond these natural conditions and convert natural flow rights that historically have been unreliable at best into a dependable full supply. The Coalition's preferred remedy, however, would do just that.

Actual Snake River measurements demonstrate this. Historical estimates show reach gains in the Snake River between the near Blackfoot gage and Milner Dam during the late irrigation season in 1938 of 1,830 cfs, and an average reach gain of 2,410 cfs during July and August over the period from 1912 to 1927—well before the onset of ground water pumping. Brendecke Affidavit at ¶ 6. By comparison, natural flow diversions by North Side Canal Company and TFCC between July 18, 2005 and September 19, 2005 averaged 2,089 cfs—remarkably similar to these historical, pre-groundwater development conditions. Brendecke Affidavit at ¶ 14. Yet the Coalition's theory suggests that the historic data is irrelevant in administration, and junior ground water rights must be held responsible any time river flows drop below the Coalition's decreed natural flow rates to assure that they will never have to draw on storage that they otherwise have had to use since the inception of their natural flow rights. The law does not permit the Director to turn a blind eye to hydrologic realities in administration.[12] In fact, it requires careful scrutiny of these conditions. *See* Rule 42.

The Coalition's argument also fails, as a practical matter, to account for the fact that its members' natural flow water rights historically were developed, and for many decades have been administered, in conjunction with their contract storage in the Upper Snake reservoirs precisely because the natural flow was never sufficient by itself. Brendecke Affidavit at ¶¶ 6 to 8. The success of their projects always has depended on a *combined* supply of natural flow and storage

[12] These historical hydrologic facts explain why curtailing juniors to provide water to seniors that seniors have never had access to would be futile. *See* discussion below at Section VII at page 24.

water. *Id.* This is further evidenced by the manner in which water rights have been administered and accounted for in Water District 01 where deliveries are sorted between natural flow and storage after the fact. Brendecke Affidavit at ¶ 6. The Director's consideration of both in determining whether material injury is occurring is appropriate both legally and as a practical matter.

The Coalition also argues that the federal government's rights to store water in the Upper Snake reservoirs is an absolute right against all junior rights until the reservoirs are completely full, without consideration of the beneficial use to be made of that stored water. SWC Brief at 14. Here again, the Coalition is mistaken about the law. Idaho law views storage rights in conjunction with the end beneficial use that will be made with the stored water:

> So far as we know, no court has held that water appropriated under statutory provisions similar to ours from a stream for irrigation purposes becomes the personal property of the appropriator in such a sense that he can claim a property right in it without reference to the beneficial use he makes of it; and we think it clear that, whatever may be the exact nature of the ownership by an appropriator of water thus stored by him, any property rights in it must be considered and construed with reference to the reasonableness of the use to which the water stored is applied or to be applied.

Glavin v. Salmon River Canal Co., 258 P. 532, 533-34 (1927). This rule applies equally to the Bureau and its contract spaceholders such as the Coalition members.

Thus, under *Glavin,* the Director is legally obligated, as he has done, to consider Coalition storage contracts in conjunction with availability of natural flow in assessing potential material injury to Coalition water rights. If the Coalition's actual beneficial use requirements can be met with the total available combined supply, there can be no material injury.

The Director must consider the total supply of water available to a senior right holder in relation to the senior's beneficial use requirements before any administration of junior rights can

occur. Failure to do so would result in unnecessary curtailments of junior rights and waste of water resources, and would prevent the full economic development and use of the state's water resources. As a matter of law, and fact, the Coalition's arguments on this issue must be dismissed.

VII. THE DIRECTOR'S ORDER DOES NOT VIOLATE THE SRBA'S COURT ORDER OF INTERIM ADMINISTRATION OF THE SRBA COURT'S NOVEMBER 17, 2005 ORDER

On January 9, 2002, in Sub-Case 92-00021, the SRBA Court ordered administration of Water Districts 35, 36, 41, and 43 ("Interim Administrative Order") consistent with water rights in those locations that are the subject of Director's reports or partial decrees that supersede the Director's reports. The Coalition's basis for asserting that the Interim Administrative Order forms the basis of the Director's authority to respond to the SWC Delivery Call is not clear. *See* SWC Brief at 15-17. In fact, it did not invoke the Interim Administrative Order as a basis for its Delivery Call. Furthermore, the May 2 Order does not rely on the Interim Administrative Order to respond to the SWC Delivery Call. To date, the Coalition has neither received partial decrees for its water rights from the SRBA nor has it received Director's reports for its water rights. In short, the Coalition's argument on this point, even assuming for purposes of argument that the Interim Administrative Order controls interim administration in Water District 1, is not ripe.

However, it may be that the Coalition's arguments arise out of an attempt to leverage the SRBA Court's November 17, 2005 Order in which it denied Rangen's request for enforcement of the Interim Administrative Order. *See* Order On Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration, SRBA Court, November 17, 2005 ("November 17 Order"). To that extent, it may be useful to clarify the November 17 Order, specifically the SRBA Court's determination as to the Director's authority to examine a request to deliver water pursuant to partial decrees.

Rangen, a spring user from Water District 130, sought IDWR enforcement of its SRBA partial decrees; it did not make a delivery call under the Conjunctive Management Rules. The Director responded to the Rangen request for enforcement of its SRBA partial decrees by finding, in dicta, that some of the Rangen decrees were issued erroneously. Rangen sought a ruling from the SRBA Court that the Director's findings were inconsistent with Rangen's decrees and with the Interim Administrative Order. The Court agreed to a limited extent, finding that the Director:

> cannot re-examine the basis for the water right as a condition of administration by looking behind the partial decree to the conditions as they existed at the time the right was appropriated. This includes a re-examination of ***prior*** existing conditions in the context of applying a "material injury" analysis through application of IDWR's Rules for Conjunctive Management of Surface and Groundwater Resources.

See November 17 Order at 8 (emphasis added). However, the Court went on to find that the Director *could* examine conditions, pre-existing or otherwise, that would make a delivery call futile:

> Prior existing conditions might be relevant, however, in explaining why in a particular circumstance a call is futile...If for example, spring flows were declining at the time the water right was appropriated as a result of change in irrigated delivery practices on the Eastern Snake River Plain, the Director's conclusion may explain why curtailment of water rights on the Eastern Snake River Plain would not result in resumption of flows to the source of the springs.

See November 17 Order at 8-9. Thus, the November 17 Order stands for the unremarkable proposition that although the Director may not decline to curtail ground water rights because he believes the surface water decree was erroneously entered—a true collateral attack on a decree—he may decline to order curtailment of ground water because of prior or existing physical conditions that make such a delivery of water futile.

Here, the Coalition takes the November 17 Order, which is soundly based on the Idaho doctrine of prior appropriation, and suggests that it controls and limits the Director's ability to find "material injury" under Rule 40. First, as pointed out above, the Director could not have re-examined any of the Coalition entities' partial decrees in reaching the factual conclusions reflected in the May 2 Order because they do not have any partial decrees. More to the point, the Director, by statute, must limit his curtailment authority to avoid ordering wasteful delivery of water. The Coalition's arguments that the Interim Administration Order and the November 17 Order make the May 2 Order void as a matter of law must fail.

VIII. THE MAY 2 ORDER SIMPLY APPLIES THE RULES

The Coalition's final argument is premised on the idea that the May 2 Order violates the Rules. *See* SWC Brief at 17-22. This again appears to be an attempt to avoid a factual inquiry into the bases of their delivery call. However, the mechanisms used by the Director and attacked by the Coalition are appropriate under Idaho law and consistent with the Director's discretionary authority under the statutes. More to the point for purposes of this brief, the mechanisms used by the Director implement the important limitations on Idaho water rights described in Part III., above: beneficial use, maximum utilization, futile call, and the prohibition of waste.

The Coalition's first argument is that the Director's application of material injury is contrary to law. To get there, the Surface Water Coalition attacks Conclusion of Law, Paragraph 47, in the May 2 Order ("Paragraph 47"). *See* SWC Brief at 18-19. Paragraph 47 finds that "depletion does not equate to material injury." It then states that material injury is instead a "highly fact specific inquiry that must be determined in accordance with" Rule 42. This is an accurate statement of the law; depletion does not automatically equate to material injury, a highly fact specific inquiry. *See, e.g.*, *Bishop v. Dixon*, 94 Idaho 171, 174, 483 P.2d 1327, 1330 (1970) (remanding case to develop factual record because "woefully" lacking an "explicit

finding of fact that the water rights of others had in fact been injured by the acts of the appellant"). Numerous instances are possible in which ground water pumping causes depletions that have no impact—material or otherwise—on senior surface rights.

Furthermore, the Director is bound to apply the Conjunctive Management Rules to determine material injury. Rule 42 requires, among other analyses, consideration of annual diversions, acreage of land served, system diversion and conveyance efficiency, and amounts diverted compared to decreed water rights. *See* Rule 42.d. and e. These inquiries flow naturally from the law and specifically require the Director to conduct "highly fact specific inquiries" to determine material injury.

Annual diversions (Rule 42.d.); Amounts diverted compared to decreed water rights (Rule 42.e.). Considering annual amounts diverted is appropriate to determine the extent of water necessary to apply to beneficial use. This is especially important if the annual amount diverted is less than the decreed amount. If the water user each year is using less than its decreed amount, it may not need the full decreed amount. This is a beneficial use inquiry. *See State v. Hagerman*, 130 Idaho at 735, 947 P.2d at 408 ("Integral to the goal of securing maximum use and benefit of our natural water resources is that water be put to beneficial use. This is a continuing obligation."); *Drake v. Earhart*, 2 Idaho 750, 756, 23 P. 541, 543 (1890) (stating that "the first appropriator shall not be allowed more than he needs for some useful purpose; that he shall not, by wasting or misusing it, deprive his neighbor of what he has not actual use for"). The Coalition's diversions are also a question of fact, and to the extent the Coalition has alleged particular quantities of diversion, IGWA and Pocatello dispute those quantities through the expert opinions they disclosed in this matter.

Acreage of land served (Rule 42.d.). As with the consideration of annual diversions, acreage of land served aids in analyzing the extent of beneficial use, and whether that use is reasonable. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 582, 513 P.2d 627, 634 (1973) (recognizing that it is the "traditional policy of the state of Idaho" to require the water resources of the state "to be devoted to beneficial use in reasonable amounts"). Again, analysis of acreage irrigated presents a question of fact. The disputes between each member of the Coalition and IDWR demonstrate that this issue is disputed.

System diversion and conveyance efficiency (Rule 42.d.). Analyzing a system's diversion and conveyance efficiency is an analysis that falls squarely within a reasonableness analysis – both reasonableness of use and reasonableness of means of diversion. *See Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 118 (1912); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 582, 513 P.2d 627, 634 (1973). This is another highly fact specific inquiry: Pocatello and IGWA's experts have disclosed opinions about system efficiencies in this case and dispute those disclosed by the Coalition's experts.

The concept of minimum full supply is an amalgamation of these considerations to provide a benchmark against which to determine injury for administration purposes. As such, it logically flows from the application of each element of the prior appropriation doctrine.

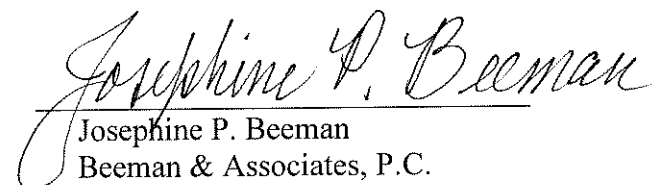
The remaining aspects of the May 2 Order the Coalition attacks are the same. Although the Coalition has coined the terms "total crop loss" and "land fallowing" they exist nowhere in the May 2 Order, as criteria or otherwise. Nevertheless, it seems apparent given the discussion in the previous sections, that in administering rights consideration of impacts of water supply on crop yields and impact of fallowed acres on beneficial use requirements are well within the

Director's discretion. As previously explained, "the details of the performance of the [Director's] duty are left to the [D]irector's discretion." Thus, the argument that the May 2 Order violates the Rules is wrong as a matter of law.

IX. CONCLUSION

Wherefore, because the Motion is wrong on the law and raises disputed issues of fact, it should be denied. The Director must hold a hearing to determine the facts as they pertain to the water use of the Coalition entities.

DATED this 28th day of April, 2006.

By 
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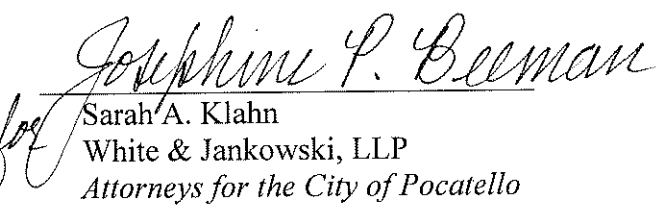
By 
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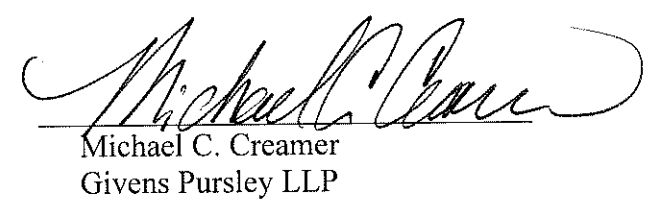
By 
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April 2006, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

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